IN THE

Supreme Court of the United States

October Term 1963

No. 107

UNITED STATES OF AMERICA,

v.

ROSS R. BARNETT, *et al.*

MOTION FOR LEAVE TO FILE AND BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION

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MOTION FOR LEAVE TO FILE A BRIEF FOR THE AMERICAN CIVIL LIBERTIES UNION AS *AMICUS CURIAE*

The American Civil Liberties Union respectfully moves for leave to file a brief as *amicus curiae* in support of the defendants in this case. The consent of the Solicitor General, for the United States of America, has been obtained, and has been filed with the Clerk. The consent of the Attorney General of Mississippi, for Ross R. Barnett, et al., was requested, but no response to this request has been received.

For many years, the American Civil Liberties Union has been concerned with helping to clarify the concept of due process of law. The Union believes that its brief in this case can assist the Court in determining the requirements of due process of law in the area of criminal con-

tempts. The interest of the Union is more fully set forth in the accompanying brief.

Respectfully submitted,

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BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION

Interest of *Amicus*

The American Civil Liberties Union is a forty-three year old, non-partisan, private organization engaged solely in defending and extending the Bill of Rights, with emphasis upon free speech, due process of law and the equal protection of the laws. Our concern in this case is with due process of law in the area of criminal contempts.

The American Civil Liberties Union believes that, "The power of a judge to inflict punishment for criminal contempt by means of a summary proceeding stands as an anomaly in the law." *Green* v. *United States*, 356 U. S. 165, 193 (1958) (dissenting opinion). Summary procedure is not a "necessity"—as is sometimes claimed—to preserve the authority of the court. And the doctrine of *stare decisis* certainly does not operate here with sufficient force to justify continuation of an unwarranted breach of the Bill of Rights. In these circumstances, the Court should rule

that "[i]n the last analysis there is no justification in history, in necessity, or most important in the Constitution for trying those charged with violating a court's decree in a manner wholly different from those accused of disobeying any other mandate of the state." *Green* v. *United States*, *supra* at 218 (dissenting opinion).

ARGUMENT

I. A jury trial is an indispensable component of a fair trial; this is especially so in criminal contempt actions.

The jury system has long been recognized as one of the fundamental procedural safeguards of our system of jurisprudence. Its history dates back at least to the Magna Charta, where it was provided:

> "No freeman shall be taken or imprisoned, or disseised, or outlawed, or banished, or any ways destroyed, nor will we pass upon him, nor will we send upon him, unless by the lawful judgment of his peers, or by the law of the land."

Blackstone attested to its vital place in the common law with these famous words:

> "[T]he trial by jury ever has been, and I trust ever will be, looked upon as the glory of the English law. And if it has so great an advantage over others in regulating civil property, how much must that advantage be heightened when it is applied to criminal cases! * * * [I]t is the most transcendent privilege which any subject can enjoy, or wish for, that he cannot be affected either in his property, his liberty, or his person, but by the unanimous consent of twelve of his neighbours and equals." 3 Blackstone, *Commentaries*, *379.

The importance of trial by jury in our system was recognized even before the Revolution. The Declaration of Rights issued in 1765 by nine of the thirteen original Colonies stated:

> "That trial by jury, is the inherent and invaluable right of every British subject of these colonies." 43 Harvard Classics 147, 148.

One of the enumerated grievances contained in the Declaration of Independence was that laws had been adopted,

> "For depriving us in many cases, of the benefits of Trial by Jury."

The great regard which the draftsmen of the Constitution attached to the right to jury trial in criminal cases is evidenced by the fact that it is twice mentioned there, both in Article III, Section 2 and in the Sixth Amendment. Hamilton, urging the adoption of the Constitution, described jury trial as the "very palladium of free government." *The Federalist*, No. 83. Later, Justice Story noted that,

> "When our more immediate ancestors removed to America, they brought this great privilege with them, as their birthright and inheritance, as a part of that admirable common law which had fenced round and interposed barriers on every side against the approaches of arbitrary power. It is now incorporated into all our State constitutions as a fundamental right, and the Constitution of the United States would have been justly obnoxious to the most conclusive objection if it had not recognized and confirmed it in the most solemn terms." Story, *Constituition*, §1779 (4th ed. 1873).

The importance of jury trial in our system of justice derives from the fact that in a very real sense the tribunal of last resort in questions of fact is the people themselves. De Tocqueville expressed this fact with his usual insight:

> "The institution of the jury * * * places the real direction of society in the hands of the governed, or of a portion of the governed, and not in that of the government. * * * He who punishes the criminal is * * * the real master of society. * * * All the soverigns who have chosen to govern by their own authority, and to direct society instead of obeying its directions,

have destroyed or enfeebled the institution of the jury." 1 De Tocqueville, *Democracy in America* (Reeve trans. 1948 ed.), 282-283.

Chief Justice Cooley set forth many of the reasons why jury trial is a necessary element of a fair trial:

> "The law has established this tribunal because it is believed that, from its numbers, the mode of their selection, and the fact that the jurors come from all classes of society, they are better calculated to judge of motives, weigh probabilities, and take what may be called a common sense view of a set of circumstances, involving both act and intent, than any single man, however pure, wise and eminent he may be. This is the theory of the law; and as applied to criminal accusations, it is eminently wise, and favorable alike to liberty and to justice." *People* v. *Garbutt*, 17 Mich. 9, 22 (1868).

This Court has often been called upon to reaffirm the vital place which the right to jury trial has in our Constitutional framework. The classic statement is contained in the landmark case *Ex parte Milligan:*

> "The great minds of the country have differed on the correct interpretation to be given to various provisions of the Federal Constitution; and judicial decision has been often invoked to settle their true meaning; but until recently no one ever doubted that the right of trial by jury was fortified in the organic law against the power of attack. It is *now* assailed; but if ideas can be expressed in words, and language has any meaning, *this right*—one of the most valuable in a free country—is preserved to every one accused of crime who is not attached to the army, or navy, or militia in actual service. • • •
>
> "This privilege is a vital principle, underlying the whole administration of criminal justice; it is not held by sufferance, and cannot be frittered away on any plea of state or political necessity. When peace prevails, and the authority of the government is undisputed, there is no difficulty of preserving the safe-

> guards of liberty; for the ordinary modes of trial are never neglected, and no one wishes it otherwise; but if society is disturbed by civil commotion—if the passions of men are aroused and the restraints of law weakened, if not disregarded—these safeguards need, and should receive, the watchful care of those intrusted with the guardianship of the Constitution and laws. In no other way can we transmit to posterity unimpaired the blessings of liberty, consecrated by the sacrifices of the Revolution." 4 Wall. [71 U. S.] 2, 122-24 (1866) [emphasis in original].

And in confirming the indispensibility of trial by jury even in civil cases, this Court said:

> "With, perhaps some exceptions, trial by jury has always been, and still is, generally regarded as the normal and preferable mode of disposing of issues of fact in civil cases at law as well as in criminal cases. Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care." *Dimick* v. *Schiedt*, 293 U. S. 474, 485-86 (1935).

Only recently, the Court has stated that,

> "This right of trial by jury ranks very high in our catalogue of constitutional safeguards." *United States ex rel. Toth* v. *Quarles*, 350 U. S. 11, 16 (1955).

In a judgment striking down a court martial conviction obtained against a civilian dependant of a member of the armed forces, an opinion joined in by four of the Justices of this Court stated:

> "Trial by jury in a court of law and in accordance with traditional modes of procedure after an indictment by grand jury has served and remains one of our most vital barriers to governmental arbitrariness. These elemental procedural safeguards were embedded in our Constitution to secure their inviolateness and sanctity against the passing demands of expediency or conveniences." *Reid* v. *Covert*, 354 U. S. 1, 10 (1957) (Opinion of Black, J.).

That the right to jury trial has proved to be a crucial safeguard against the abuse of criminal process in a wide variety of contexts needs no elaborate citation of authority. But this right is even more important in the case of criminal contempt because of the novelty of the method of prosecution. There is an obvious built-in unfairness in permitting a judge, in order to "vindicate his authority" and who thus is the aggrieved party, to act as prosecutor, witness, jury and judge. It is elementary that no man can be judge in his own case and that no man is permitted to try cases where he has an interest in the outcome. *In re Murchison*, 349 U. S. 133, 136 (1955). Yet in criminal contempts, the judge, with the full panoply of his power, is an unequal match for the defendant. The judge's power to punish contempt is virtually limitless as to the scope of the offense, the means of punishment and the procedure employed. The only effective restraint upon him is the often ineffectual right of judicial review, where the sole question is whether the judge has abused his discretion. The judiciary, as the final bastion against oppression, must be free of even the slightest suggestion of unfair practices.

It has been argued that because of the favored position of these defendants in the eyes of Mississippians, no jury will be found to convict them. But the administration of impartial justice, and not the rendering of swift and easy convictions, is the business of the courts. Every procedural safeguard in the Constitution makes it more difficult to secure convictions, just as every other provision in the Bill of Rights affords an added measure of protection against the coercive power of the Government, whether existing or potential. That a particular Constitutional liberty may in some cases make it possible for the guilty to escape punishment has never been a reason for not invoking it. Experience has taught us that such a sacrifice is necessary to the vindication of a critical Constitutional principle. In the oft-quoted words of Mr. Justice Holmes:

> "We have to choose, and for my part I think it a less evil that some criminals should escape than that the Government should play an ignoble part." *Olmstead* v. *United States*, 277 U. S. 438, 470 (1928) (dissenting opinion).

Finally, it may be argued that these defendants do not deserve a jury trial because of the flagrant nature of the contempts charged against them. But this Court has often rejected the proposition that because a particular defendant is a "bad man" his constitutional rights are not worth protecting. Unsavory characters may occasionally be benefited in order to affirm an important liberty.

II. Summary trial of criminal contempts is not "necessary" to vindicate the authority of the court or for any other reason.

As Mr. Justice Black observed in *Green* v. *United States*, 356 U. S. 165, 213 (1958), some who defend summary trial of the crime of contempt attempt to justify this procedure as a "necessity" if judicial orders are to be obeyed and the authority of courts is to be maintained. Even if there were such a "necessity", it is doubtful that it would permit a deviation from the Bill of Rights. But in fact, no "necessity" exists that conceivably warrants this extraordinary method of trial.

In the first place, criminal proceedings are unnecessary to assure compliance with lawful court orders. Civil contempt has always been the appropriate remedy to assure such compliance. As long as a defendant faces imprisonment for refusal to comply, a court's order will eventually be satisfied. Long ago, this Court described the limits of the power to punish for contempt as "[t]he least possible power adequate to the end proposed." *Anderson* v. *Dunn*, 6 Wheat. [19 U. S.] 204, 231 (1821). See also *In re Michael*, 326 U. S. 224, 227 (1945); *In re Oliver*, 333 U. S.

257, 274 (1948). The remedy of criminal contempt is a power in excess of the end proposed, compliance with court orders.

Related to the claim that compliance with court orders necessitates a summary trial is the assertion that a judge is able to dispose of a criminal contempt faster and cheaper, and thus more swiftly vindicate his authority. This idea misconceives both the purposes of the criminal law and of the Bill of Rights. Whatever speed and economies might result can hardly justify abandonment of a basic Constitutional protection. As Mr. Justice Black stated:

> "Cheap, easy convictions were not the primary concern of those who adopted the Constitution and the Bill of Rights. Every procedural safeguard they established purposely made it more difficult for the Government to convict those it accused of crimes. On their scale of values justice occupied at least as high a position as economy." *Green* v. *United States*, 356 U. S. 165, 216 (1958) (dissenting opinion).

Even more important, once there is no longer any question of compelling compliance with a court order—the province of civil contempt—there can be no justification for swift disposition. In such cases, there is ample time to provide the defendant the full benefit of all Constitutional safeguards. This was recognized by Justices Holmes and Brandeis when they declared that "when there is no need for immediate action contempts are like any other breach of law and should be dealt with as the law deals with other illegal acts." *Toledo Newspaper Co.* v. *United States*, 247 U. S. 402, 425-26 (1918) (dissenting opinion). The instant case provides a dramatic example of the absence of any need for haste. It is now almost a year since the incident involving James H. Meredith's admission to the University of Mississippi that led to the citation of these defendants for contempt of the Court of Appeals. Meredith has been graduated, and there is no

present violence or any other reason which would justify a hasty trial for criminal contempt.

Equally unavailing is the contention that jury trial for criminal contempt, especially where racist sympathies exceed respect for federal courts, will subject judges to personal abuse and to courtroom disturbances because no jury will be likely to convict the miscreants. However, the present suit does not involve contempts in the presence of the court or so near to it as to disrupt proceedings. That category of contempts is not pertinent to the disposition of the present case. Moreover, Congress has specifically excluded this category when granting jury trials in certain types of criminal contempt. 42 U. S. C. § 1995; 29 U. S. C. § 528; 18 U. S. C. §§ 402, 3691, 3692.

The claim of "necessity", so clearly unpersuasive in the general run of cases, takes on a peculiar coloration in the present context. Lurking in the background of this case is the unarticulated premise that unless these defendants are criminally punished for violation of the order of the Court of Appeals, irreparable damage may befall the movement to secure civil rights for Negroes in the South and elsewhere. The idea is, no doubt, that only punitive action will prevent certain Southern officials from intervening with the authority and power of their offices to head off attempts to comply with judicial orders entered on behalf of Negroes. This claim lacks any validity and reflects a misunderstanding of the purposes of criminal contempt as well as the struggle of the Negro for equality. The resources of the law, including civil contempt, are sufficient to coerce governors and private citizens into compliance with lawful orders of federal courts. The subsequent invocation of the criminal process can have little or no added effect on the Government's ability to assure that such edicts are obeyed. The only purpose of such process is to *punish* violators for past acts, a punishment that surely need not be hasty or expeditious.

It should be obvious from recent events that the Negro civil rights movement does not depend on the criminal law. Within recent years, indeed recent months, the Negro has made historic gains in hundreds of communities in more than a score of states with the assistance, as far as we have been able to determine, of federal criminal contempt in only one episode. See *Kasper* v. *Brittain*, 245 F. 2d 92, 97 (6th Cir.), *cert. den.*, 355 U. S. 834 (1957); *Bullock* v. *United States*, 265 F. 2d 683 (6th Cir.), *cert. den.*, 360 U. S. 909, 932 (1959).

The paucity of such cases involving criminal contempt is particularly significant in light of the varied circumstances under which Negroes have sought vindication of their rights and the numerous court orders entered for this purpose. This strongly indicates that the availability of criminal contempt is unimportant to the success of the civil rights movement and that the just claims of the Negro can be achieved without subverting the Constitutional rights of any criminal defendant.

Finally, it may be suggested that a jury trial will virtually assure the acquittal of these defendants because a white Mississippi jury would not hold them in contempt for flouting an order to admit a Negro to the University of Mississippi. This may be so, but it is irrelevant to the present issue. Securing convictions is not the only goal of the criminal law. The means by which convictions are obtained has a claim of equal stature. This faith remains the cornerstone of our system of criminal law. *Mapp* v. *Ohio*, 367 U. S. 643 (1961); *Gideon* v. *Wainwright*, 372 U. S. 335 (1963). Only by adherence to it in all cases will the safeguards of the Bills of Rights be preserved for the benefit of all defendants who are hailed before the criminal bar. See Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 Harv. L. Rev. 1 (1959).

III. The power to punish contempt without a jury trial rests upon an historical error which should not be perpetuated as a Constitutional principle.

The constitutionality of the power to punish contempt summarily and without trial by jury has been bottomed on the assertion that it derives from the earliest origins of the common law, antedating the adoption of the Constitution. Blackstone asserts that the power derives from "long and immemorial usage." 4 Blackstone, *Commentaries*, *288. However, modern scholarship has discovered that this historical interpretation is at best dubious. In a notable series of essays, Sir John Charles Fox, Senior Master of the Chancery Division, has revealed that until the early part of the Eighteenth Century contempt was regarded as an ordinary proceeding attended with all of the procedural safeguards of a criminal trial. He details many instances where such cases were punished only upon indictment and after trial. Fox, *The King* v. *Almon*, 24 Law Q. Rev. 184, 191; 266, 270 (1908); Fox, *Eccentricities of the Law of Contempt of Court*, 36 Law Q. Rev. 394, 396 (1920). Fox's researches included an examination of the original rolls of the English courts and it was his conclusion that the power to punish contempt summarily, is without historical basis. Fox, *The Summary Process to Punish Contempt*, 25 Law Q. Rev. 238, 242-44 (1909).

The earliest assertion of the power appears in the proceedings of the infamous Court of Star Chamber. Fox, *The King* v. *Almon*, 24 Law Q. Rev. 266, 270 *et seq.* (1908); Hudson, STAR CHAMBER ([2 Hargrove] Collectanea Juridica) 117. After the abolition of the Star Chamber in 1641, no instance of summary punishment appears until 1721. Thereafter, there are a few widely scattered instances of the use of the power until the so-called "judgment" of Lord Chief Justice Wilmot in *The King* v. *Almon* (1765). In his opinion, Wilmot states that the power to punish contempt summarily,

> "'stands upon the same immemorial usage as supports the whole fabric of the common law; it is as much the *lex terrae* and within the exception of Magna Charta as the issuing any other legal process whatever. I have examined very carefully to see if I could find out any vestiges or traces of its introduction but can find none. It is as ancient as any other part of the common law; there is no priority or posteriority to be discovered about it and therefore cannot be said to invade the common law but to act in an alliance and friendly conjunction with every other provision which the wisdom of our ancestors has established for the general good of society." Wilmot, *Notes of Opinions and Judgments*, 243, 254 (1802).

The prosecution involved in the case was later dropped and Wilmot's "judgment" was merely the *draft* of an *undelivered* opinion. Had it not been included in the publication of Wilmot's works ten years after his death, it would never have acquired the force of precedent. Fox notes the striking similarities between Wilmot's unfounded assertions in his 1765 opinion and Blackstone's statement in the fourth volume of his *Commentaries*, published in 1769, quoted *supra*, p. 11, and concludes that the former had great influence on the latter. Fox, *The Summary Process to Punish Contempt*, 25 Law Q. Rev. 238, 247, 253-54 fn. (k) (1909). Wilmot's opinion was not even cited in the English reports until 1821 and was not accepted as a leading authority until cited by Chancellor Lyndhurst in *Ex parte Van Sandau*, 1 Ph. 445, 454 (1844). Ironically, Wilmot's "judgment" has become the most widely cited authority for the proposition that the power to punish contempt summarily derives from the earliest origins of the common law. Not only was the historical basis of Wilmot's opinion erroneous, but, in addition, it rested upon a misconception of terminology. For as Frankfurter and Landis point out, Wilmot confused "immemorial usage" to punish criminal contempt with "immemorial usage" to

punish only after a jury verdict. Their article states, "For a hundred years the law has been seeking to extricate itself from his confusion." Frankfurter and Landis, *Power to Regulate Contempts*, 37 Harv. L. Rev. 1010, 1049 (1924).

Thus, Wilmot's historical error, perpetuated by Blackstone, has had its influence on the development of American Constitutional law. The case at bar presents the question whether Wilmot's erroneous assertion as to the common law origins of the power to punish contempt summarily should be forever enshrined as a Constitutional principle. Ancient historical error, in this case the fiction of "immemorial usage", should not furnish the precedent for a limitation of the right to jury trial, perhaps the most important single liberty guaranteed by the Constitution.

But even assuming that the English common law courts did possess the power to punish contempt summarily, our Constitution represented a radical departure from past practice. The Founders rejected many prevalent political and legal institutions and determined upon a new experiment in democratic government. The very concept of a written Constitution, alien to the English system, is reason enough for rejection of a *sub silentio* transplanting of summary punishment for contempt into American law. Mr. Justice Black has eloquently advanced this thesis:

> "[O]ur Constitution and Bill of Rights were manifestly not designed to perpetuate, to preserve inviolate, every arbitrary and oppressive governmental practice then tolerated, or thought to be, in England. Those who formed the Constitution struck out anew free of previous shackles in an effort to obtain a better order of government more congenial to human liberty and welfare. It cannot be seriously claimed that they intended to adopt the common law wholesale. They accepted those portions of it which were adapted to this country and conformed to the ideals of its citizens and rejected the remainder.

> In truth there was wide-spread hostility to the common law in general and profound opposition to its adoption into our jurisprudence from the commencement of the Revolutionary War until long after the Constitution was ratified." *Green* v. *United States*, 356 U. S. 165, 212 (1958) (dissenting opinion) [citations omitted].

Article III, Section 2, of the Constitution provides:

> "The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury . . . ."

The Sixth Amendment provides:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ."

There is no implicit exception regarding contempt anywhere in the Constitution. Can it be denied that criminal contempt, carrying as it does a fixed sentence of imprisonment, as opposed to the indeterminate sentence of civil contempt, is within the meaning of the terms "all Crimes" and "all criminal prosecutions"? This Court has rejected any semantic distinction between the crime of contempt and other crimes. For instance, it has been held that a criminal contempt is within the federal statute of limitations. *Gompers* v. *United States*, 233 U. S. 604 (1914). In that case, the Court, speaking through Mr. Justice Holmes, said:

> "These contempts are infractions of the law, visited with punishment as such. If such acts are not criminal, we are in error as to the most fundamental characteristic of crimes as that word has been understood in English speech. So truly are they crimes that it seems to be proved that in the early law they were punished only by the usual criminal procedure, and that at least in England it seems that they still may be and preferably are tried in that way." 233 U. S. at 610-611 [citations omitted].

Similarly, it has been held that criminal contempt is an "offense against the United States" within the presidential power of pardon. *Ex parte Grossman*, 267 U. S. 87 (1925).

This Court has often stated that the words of the Constitution are to be interpreted in their ordinary meaning:

> "The Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary meaning as distinguished from technical meaning; where the intention is clear there is no room for construction and no excuse for interpolation or addition." *United States* v. *Sprague*, 282 U. S. 716, 731 (1931).

In "normal and ordinary", as distinguished from "technical" usage, there can be no difference between criminal contempt and any other crime. The Seventh Amendment, which guarantees a jury trial in all suits at common law where the amount in controversy exceeds $20, presents a *reductio ad absurdum* of a construction which asserts that the Constitution excepted criminal contempt, punishable by a definite term of imprisonment, from the right of jury trial. Surely such a strained and unwarranted interpretation, based upon erroneous history, is incompatible with Constitutional principles and should be rejected by this Court.

IV. The doctrine of *stare decisis* does not impede a ruling that the Constitution bars a summary trial for criminal contempt.

Although criminal contempts have been tried summarily in the United States from the beginning, no substantial obstacle flowing from the doctrine of *stare decisis* bars this Court from returning to the correct Constitutional principle.

Mr. Justice Brandeis, in a famous passage, defined the extent of the Court's obligation to adhere to prior rulings:

> "*Stare decisis* is usually the wise policy because in most matters it is more important that the appli-

> cable rule of law be settled than that it be settled right. * * * But in cases involving the Federal Constitution, where correction through legislative action is practically impossible, this Court has often overruled its earlier decisions. The Court bows to the lessons of experience and the force of better reasoning, recognizing that the process of trial and error, so fruitful in the physical sciences, is appropriate also in the judicial function." *Burnet* v. *Coronado Oil & Gas Co.*, 285 U. S. 393, 406-08 (1932) (dissenting opinion).

In that case, Mr. Justice Brandeis referred to scores of cases in which the Court had overruled prior decisions. These decisions span virtually the Court's entire history and touch every aspect of its business. E.g., *The Genesee Chief*, 12 How. [53 U. S.] 443 (1851), overruling *The Thomas Jefferson*, 10 Wheat. [23 U. S.] 428 (1825); *Legal Tender Cases*, 12 Wall. [79 U. S.] 457 (1871), overruling *Hepburn* v. *Griswold*, 8 Wall. [75 U. S.] 603 (1870). In many of these instances, earlier decisions were overruled even though correction might have been secured by legislation. E.g., *Rosen* v. *United States*, 245 U. S. 467 (1918), overruling *United States* v. *Reid*, 12 How. [53 U. S.] 361 (1851). See generally, Douglas, *Stare Decisis*, 49 Colum. L. Rev. 735 (1949).

Bowing before "the lessons of experience and the force of better reasoning," this Court has altered long-standing rules in order to rectify its own errors even to the present day. *Erie R.R.* v. *Tompkins*, 304 U.S. 64 (1938), overruling *Swift* v. *Tyson*, 16 Pet. [41 U.S.] 1 (1842); *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624 (1943), overruling *Minersville School Dist.* v. *Gobitis*, 310 U. S. 586 (1940); *Brown* v. *Board of Education*, 347 U. S. 483 (1954), overruling *Plessy* v. *Ferguson*, 163 U. S. 537 (1896); *Mapp* v. *Ohio*, 367 U.S. 643 (1961), overruling *Wolf* v. *Colorado*, 338 U.S. 25 (1949); *Gideon* v. *Wainwright*, 372 U. S. 335 (1963), overruling *Betts* v. *Brady*, 316 U. S. 455

(1942), are only a few of the many cases in which this Court has revised Constitutional decisions of the first magnitude.

The principles underlying *stare decisis* are particularly attenuated here. The issue presented is of constitutional dimensions and therefore is primarily for this Court. Moreover, no arguable questions of social and economic policy need be debated; as shown above, demonstrable historical error has for almost two centuries prevented defendants in criminal contempt actions from receiving the benefit of the Bill of Rights. In this setting, this Court certainly need not fear that it is exceeding its authority by acting as a "third branch of the legislature." This Court's obligation is undiluted by any of the other policies associated with *stare decisis*. In urging this result, Mr. Justice Black has stated:

> "No justified expectations would be destroyed by the course I propose. There has been no heavy investment in reliance on the earlier cases; they do not remotely lay down rules to guide men in their commercial or property affairs. Instead they concern the manner in which persons are to be tried by the Government for their alleged crimes. Certainly in this area there is no excuse for the perpetuation of past errors, particularly errors of great continuing importance with ominous potentialities." *Green* v. *United States*, 356 U.S. 165, 197 (1958).

The unbroken line of cases permitting summary trials in cases of criminal contempt are a monument to the ease with which historical error can be perpetuated, even in matters of the utmost gravity. This Court should recognize that error has been committed and that the error can be cured with no substantial infringement of the policies supporting continuity of decision. By rejecting the device of summary trial in criminal contempt actions, it will reaffirm the vitality of the "scheme of ordered liberty" that must at all costs be preserved.

Conclusion

The right to jury trial is one of the most crucial safeguards against tyranny and oppression contained in the Constitution. To dispense with that right and to permit a summary trial in cases of criminal contempt is justified neither by necessity nor by history. Indeed, the historical basis for the power to punish contempt summarily is a fiction which this Court should disavow. Adherence to precedent should not prevent this Court from correcting past errors, especially where a great Constitutional principle is at stake.

Respectfully submitted,

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